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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUAN JOSE MARTINEZ-MADERA, Petitioner, v. MICHAEL CHERTOFF, Secretary of Department of Homeland Security, et al., Respondents.	Civil No. 07 cv 2237 JLS (WMc) GOVERNMENT'S RETURN TO COURT'S ORDER TO SHOW CAUSE WHY MOTION TO APPOINT COUNSEL SHOULD NOT BE GRANTED

I.

INTRODUCTION

On March 14, 2008, this Court ordered Respondent's to show cause why Petitioner's renewed Motion to Appoint Counsel should not be granted. [Doc. 20 at 3.]. It is Department of Justice policy to not take a position in response to a Motion to Appoint Counsel. Accordingly, the Government does not support or oppose Petitioner's Motion to Appoint Counsel. However, because the Court's decision depends in part on Petitioner's likelihood of success on the merits of his recently filed Motion to Certify as Class Action his individual habeas action ("Class Certification Motion"), [Doc. 20 at 3], the Government seeks to present its position on Petitioner's likelihood of success on the merits. The Government asserts that Petitioner is unlikely to succeed on the merits of the Class Certification Motion because the Court lacks jurisdiction under 8 U.S.C. §1252(f)(1) to issue the class relief requested and because the proposed class cannot satisfy Fed R. Civ. P. 23 requirements.

II.

STATEMENT OF THE CASE

As summarized in this Court's March 14, 2008 Order, [Doc. 20 at 1-2], on November 26, 2007, Petitioner filed a Petition for Writ of Habeas Corpus seeking release from Department of Homeland Security custody ("DHS") pending resolution of the Ninth Circuit's review of his final removal order. Petitioner also filed a Motion to Appoint Counsel, which the Court denied without prejudice on December 5, 2007. Once Petitioner's traverse is filed,[1/] the individual habeas claim will be fully briefed and ready for determination on the merits.

In addition to the adjudication of the merits of his petition, Petitioner seeks to certify his individual habeas action as a class action. Plaintiff seeks class-wide declaratory and injunctive relief on behalf of all civil immigration detainees in this district. See Class Certification Motion at 1. In connection with the Class Certification Motion, Petitioner renewed his Motion to Appoint Counsel.

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[1/] On March 7, 2008, Petitioner served a copy of his Traverse on Respondents and undersigned counsel by mail. However, there was no electronic notification of the filing and there is no record of the traverse being filed with the Court. Accordingly, Counsel assumes that the traverse has not yet been filed with the Court and that Petitioner has until March 29, 2008 to perfect his filing. [Doc. 20 at 3].

II.

ARGUMENT

A. PETITIONER IS UNLIKELY TO SUCCEED ON THE MERITS OF HIS MOTION TO CERTIFY CLASS ACTION BECAUSE THE COURT LACKS JURISDICTION UNDER 8 U.S.C. § 1252(f)(1) TO ISSUE THE CLASS RELIEF REQUESTED

Petitioner seeks class-wide injunctive relief requiring Respondents to either release Petitioner and the putative class or provide the putative class with a hearing before an immigration judge. Petitioner's Habeas Corpus Petition at 16. However, the plain language of Section 1252(f)(1) divests this Court of subject matter jurisdiction to issue the relief requested. See 8 U.S.C. § 1252(f)(1). Specifically, 8 U.S.C. § 1252(f)(1), entitled "Limit on injunctive relief," clearly states that when any person seeks to enjoin the operation of the provisions of Part IV, a district court does not have jurisdiction to hear such claims unless they pertain to the application of these provisions to an *individual* alien, and not to an individual class representative or to a class as a whole:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. §§1221-1231], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

INA § 242(f)(1), 8 U.S.C. § 1252(f)(1). Accordingly, to the extent that Petitioner or a putative class-member alleges that Respondents' application of the detention provisions have violated his or her rights, those claims should be heard in the context of an individual petition for a writ of habeas corpus. Because the Court lacks jurisdiction under Section 1252(f)(1) to issue the relief requested, Petitioner is unlikely to succeed on the merits of the Class Certification Motion.

B. THE PROPOSED CLASS WILL BE UNABLE TO MEET THE REQUIREMENTS OF FED. R. CIV. P. 23

Even assuming the Court has jurisdiction to issue class relief, Petitioner is unlikely to succeed on merits of the Class Certification Motion because the proposed class fails to satisfy the requirements of Fed. R. Civ. P. 23 governing class actions. In the instant action, Petitioner seeks to certify a class defined as all immigration detainees in the custody of Immigration and Customs Enforcement ("ICE"), an investigative branch of DHS, at the El Centro Detention Facility as well as other detention facilities

in this District. Class Certification Motion at 2. To obtain class certification under Fed. R. Civ. P. 23, the party seeking certification must satisfy all of the four factors in Rule 23(a), namely:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy of representation"].

Fed. R. Civ. P. 23(a). In addition to these requirements, a court must find that the class satisfies at least one requirement of Fed. R. Civ. P. 23(b). Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001); Berry v. Baca, 226 F.R.D. 398, 401-02 (C.D. Cal. 2005).

The party seeking class certification bears the burden of proof on all factors. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). Indeed, the failure to meet " . . . any one of Rule 23's requirements destroys the alleged class action." Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975)); see also Nguyen Da Yen v. Kissinger, 70 F.R.D. 656 (N.D. Cal. 1976), appeal dismissed as moot, 602 F.2d 925 (9th Cir. 1979). The district court must conduct a rigorous analysis to determine that the requirements of Rule 23 have been met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). If a court is not fully satisfied, the class should not be certified. Id. In the face of these obligations, the proposed class cannot satisfy the affirmative burdens for class certification.

1. The Proposed Class Cannot Satisfy Rule 23(a)(2)'s Commonality Requirement

Rule 23(a)(2) requires that there be "questions of law or fact common to the class" prior to certifying a case potentially suitable for class action. "The commonality requirement is said to be met if plaintiffs' grievances share a common question of law or of fact." Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001). More specifically, "commonality focuses on the relationship of common facts and legal issues among class members." Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1342 (9th Cir. 2007). Thus, the commonality requirement is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." Smith v. University of Washington Law School, 2 F.Supp.2d 1324, 1342 (W.D. Wash. 1998) (quoting Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 712 (D. Ariz.1993); see also Foreman v. Heineman, 240 F.R.D. 456, 506 (D. Neb. 2007). Here, it is clear that atypical questions of law and fact

apply to the proposed class and therefore the proposed class cannot satisfy the commonality requirement. See Falcon, 457 U.S. at 155 (holding that the "class-action device" is "'particularly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'") (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

Specifically, Petitioner cannot satisfy this particular prerequisite for class certification because the proposed definition of the class fails to take into consideration that aliens are detained pursuant to different statutory provisions that apply different legal standards in determining whether continued detention is appropriate under the particular provision.[2/] Due to the circumstances surrounding each detainee's case, his or her detention will result in detention procedures specific to his or her case. Also, depending upon an agency determination and applicable law, it may be justified that one detainee is detained for ten months, while another is detained for eight months.

For example, some members of the putative class may be held under Section 1231(a)(6), which provides that certain aliens may be held beyond the normal 90-day removal period required under Section 1231(a)(2). See Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (noting that after the 90-day period, the government "may" continue to detain an alien for a six-month"presumptively reasonable period of detention."). Release is not automatically mandated after the expiration of the six-month period, rather it is dependent on the individual determination as to whether or not the alien's removal is reasonably foreseeable. Id. ("This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."). Alternatively, the putative class may involve the detention of an alien who is not yet subject to a final removal order and who is lawfully and mandatorily under 8 U.S.C. § 1226(c) or aliens who are barred from seeking habeas review because they have failed to exhaust their administrative and judicial remedies before challenging government actions through the vehicle of a habeas petition. Castro-

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[2/] These provisions include: (1) 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A), and (b)(1)(B)(iii)(IV), for arriving aliens not admitted to the United States, (2) 8 U.S.C. §§ 1226(a) and 1226(c), for aliens detained pending a final administrative order of removal, and (3) 8 U.S.C. §§ 1231(a)(1), for aliens detained after an administratively final order of removal.

Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001).

The existence of issues involving these different facts and statutes argues against a systematic imposition of "relief" as Petitioner requests. Rather, an individualized review is necessary in order to determine lawfulness under 28 U.S.C. § 2241 for each individual class member. Given the nature of the putative class members' individual detention determinations and considerations, these causes of action are fragmented and therefore ill-suited for declaratory and/or injunctive relief in the form of a class action.[3/] Accordingly, the putative class does not aver a common set of factual or legal allegations. See Nguyen, 70 F.R.D. at 663 ("The common principles of 'due process' and 'liberty' . . . do not provide a common question of law.").

2. The Proposed Class Cannot Satisfy Rule 23(a)(3)'s Typicality Requirement

Petitioner likewise cannot demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.1992) (internal quotation omitted). See also Falcon, 457 U.S. at 156 ("We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class member.") (internal quotation omitted). To this end, Petitioner cites his detention as being the sole course of conduct that ties all other claims together in this case. However, there is a clear disconnect between the Petitioner's claim and each of the putative class members, as they are substantively dissimilar. In particular, Petitioner has been found to be an aggravated felon, and he continues to challenge whether he is an aggravated felon. Government's Return at 2. The putative class members, on the other hand, could be individuals granted

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[3/] The Court should also note that of the individuals listed in the Class Certification Motion, at least two have pending habeas actions before this District Court. See Delgado v. Chertoff, No. 07-1315 W-CAB (ICE ordered Petitioner, who is subject to a final removal order, released on bond but habeas proceeding remains pending); See Siverya-Garcia v. State of California, 08cv0018 H-NLS (habeas proceeding involving Petitioner who has not yet exhausted administrative remedies). Another individual is pursuing an appeal of a denied habeas petition. See Carrera-Virula v. DHS, No. 08-55001 (9th Cir. 2008) (district court in Carrera-Virula v. DHS, No. 07-0439-BEN denied habeas petition on the basis that Petitioner's removal was reasonably foreseeable). Finally, Counsel has been informed that another individual, Antonio Damas Vizcarra, is no longer in custody and therefore any claims by this individual are moot.

asylum or withholding of removal by the agency, detainees who cannot be removed because their home country delays the process, or detainees who seek to delay the process by not cooperating and providing the paperwork necessary to be removed (8 U.S.C. § 1231(a)(1)(C)). Given the discreet facts and law attributable to each putative class member as discussed above, Petitioner cannot establish that his claims are typical of the proposed class.

Further, "[t]ypicality . . . is [also] said to require that the claims of the class representatives be typical of those of the class, and [is] to be 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001) (quoting Marisol v. Giuliani, 126 F.3d 372, 376 (2nd Cir.1997)). Thus, "[i]n order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining 'some direct injury as a result of the challenged statute or official conduct.'" Id. at 860 (quoting O'Shea v. Littleton, 414 U.S. 488 (1974). Here, Petitioner simply alleges that the Petitioner's claims and the claims of all class members all arise from the same course of conduct of the Respondents -- wrongfully detaining lawful permanent residents. Class Certification at 1. This fails to take into consideration that the authority under which Petitioner was detained prior to his release is not necessarily typical of every putative class member. Because there is no evidence that Petitioner's and putative class members' detention is caused by the same or similar official conduct, Petitioner cannot establish that the Respondents' alleged wrongful conduct is the sole and direct cause of harm to the named Petitioner and putative class members. Therefore, Petitioner cannot satisfy his burden of demonstrating that his claims are typical of the claims of the class as a whole.

3. The Proposed Class Cannot Satisfy Rule 23(a)(4)'s Adequacy of Representation Requirement

Petitioner also cannot demonstrate that he is an adequate representative of the class he purports to represent. See Fed. R. Civ. P. 23(a)(4). A showing of adequate representation requires named Plaintiffs in a putative class action to demonstrate that their claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Falcon, 457 U.S. at 158 n.13. "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1233 (9th Cir. 2007). As applied to the

instant case, Petitioner is unlikely to demonstrate how adjudication of his claims will fairly and adequately protect the interest of the proposed class because, as discussed above, the particular facts of Petitioner's detention prevent him from adequately representing the claims of a putative class member who is otherwise detained under different circumstances. See Fed. R. Civ. P. 23(a)(4).

4. The Proposed Class Is Not Maintainable Under 23(b)(2)

Petitioner also fails to demonstrate that the proposed class is maintainable under one of the paragraphs of Rule 23(b). Here, on its face, Petitioner's cause of action is not maintainable under subsection (b)(2), which applies if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). In light of the class proposed by Petitioner and the explanation above, it cannot be said that Respondents have not acted (or refused to act) on grounds applicable to the class as a whole. Indeed, there were different reasons for Petitioner's and putative class members' length of detention and, as explained above, the class challenging Respondents' detention determinations presents several distinct legal claims. See Nguyen, at 6. As such, Respondents' actions with respect to individuals challenging each of these policies would not be "generally applicable" to the putative class as a whole. See Fed. R. Civ. P. 23(b)(2). Because Petitioner cannot demonstrate that his proposed action will satisfy the additional requirements of Rule 23(b) or the Rule 23(a) requirements of commonality, typicality, and adequacy of representation Petitioner is unlikely to succeed on the merits of his Class Certification Motion.

IV.

CONCLUSION

For all of the foregoing reasons, Respondents do not take a position as to the Motion to Appoint Counsel but submit that Petitioner is unlikely to succeed on the merits of his Class Certification Motion.

Dated: March 28, 2008

Respectfully submitted,

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